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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TINO FIUMARA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Was petitioner deprived of his Sixth Amendment right to the effective assistance of counsel when his attorney failed to reveal to him a substantial conflict of interest between the attorney for a co-defendant, and a key government witness, when that attorney was relied upon by petitioner's attorney to resolve crucial defense decisions?

2. Did the Court of Appeals err in not ordering a new trial because of the introduction into evidence of intercepted conversations that had been seized in violation of 18 U.S.C. § 2517?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Tino Fiumara, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit rendered in this case on January 26, 1984.

Opinions Below

The opinion of the Court of Appeals is unreported and appears in Appendix A. The Court of Appeals affirmed the judgment of the United States District Court for the Southern District of New York, Sand, *J.*, which denied, without a hearing, petitioner's motion, pursuant to 28 U.S.C. § 2255, to vacate and set aside the judgment of conviction previously entered in the United States District Court for the Southern District. The District Court's Memorandum Endorsement appears in Appendix B. The opinion of the Second Circuit Court of Appeals affirming the judgment of conviction is reported under the title

United States v. *Clemente* at 640 F.2d 1069 (2d Cir.), *cert. denied*, 454 U.S. 820 (1981) and appears in Appendix C.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and 28 U.S.C. § 2255. The petition for a writ of certiorari is filed within 60 days of the denial by the Court of Appeals of petitioner's appeal to that Court on January 26, 1984.

Constitutional Provisions Involved

U.S. Const. amend. VI. This provision appears in Appendix D to this petition.

Statutory Provisions Involved

18 U.S.C. § 2515, 18 U.S.C. § 2517(5), 28 U.S.C. § 2255, Fed.R.Crim.P. Rule 12(b) and 12(f). These provisions appear in Appendix E to this petition.

Statement of the Case

Procedural History

On March 6, 1979, an indictment was filed in the United States District Court for the Southern District of New York in which petitioner was charged with numerous violations of federal law, including 18 U.S.C. §§ 1951 and 1962, 26 U.S.C. § 7206(1) and 29 U.S.C. § 186(b). The trial of this indictment commenced on January 17, 1980; however, on January 31, 1980, upon motion of the defendants, a mistrial was declared. Upon retrial of the indictment the jury returned a verdict of guilty and the court committed petitioner to the custody of the Attorney General for a

period of twenty-five years and imposed a stand-committed fine of $10,000.00.

On June 23, 1980, petitioner filed a notice of appeal from the judgment of conviction to the United States Court of Appeals for the Second Circuit. On November 5, 1980, petitioner's appeal was argued and on February 26, 1981, the decision of the court of appeals was rendered, affirming the judgment of conviction under the title *United States* v. *Clemente, et al.* (C. 14a).[1]

On May 12, 1983, petitioner filed a motion in the district court pursuant to 28 U.S.C. § 2255, to vacate and set aside the judgment of conviction on the grounds that he is being held in custody in violation of the Constitution and laws of the United States. Petitioner's motion was denied by the district court in a memorandum endorsement (B. 12a). On December 15, 1983 petitioner's appeal was argued and on January 26, 1984, the court of appeals affirmed the decision of the district court (A. 1a).

Statement of Facts

(1)

Petitioner, in his motion below, asserted that a conflict of interest existed between the petitioner, his counsel, Mr. McAlevy and Joseph A. Hayden, Jr., counsel for petitioner's co-defendant Michael Copolla. Mr. Hayden was brought into the case to represent Copolla on the recommendation of petitioner's own counsel. Significantly, because of his trial experience it was decided amongst the above individuals that the motion practice and legal work would be handled essentially by Mr. Hayden (P.12).[2] Accordingly,

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[1] References to the Appendix will hereafter be designated by the letter of the Appendix preceding the page number.

[2] Hereafter, references to the facts alleged in Movant's Memorandum of Law accompanying petitioner's motion pursuant to 28 U.S.C. § 2255, will be designated by the letter "P" preceding the page number of the Memorandum.

when important strategic decisions were to be made with regard to such matters as cross-examination, presentation of proof, the order of examination, etc., they were, in the main, made as a result of conferences between Mr. McAlevy, Mr. Hayden and counsel for the other defendants.

For the purposes of the instant petition and as alleged below, the most important "joint decision" which was made involved the question of whether the government's chief witness, Robert Delaney, should be cross-examined concerning his bias against the petitioner. The source of this bias was Delaney's knowledge of the prior sexual relationship between Delaney's wife, Joann Schwab, and petitioner (P.13).

Detective Robert J. Delaney became a key government witness as a result of his participation in an investigation known as "Project Alpha." Project Alpha involved a joint State and Federal sting operation in which a company known as "Alamo Transportation Company", was utilized by law enforcement officials as a front in their attempt to discover evidence of criminal conduct in the trucking industry in the State of New Jersey (P.6-7).

Two of the principal law enforcement officers involved in this operation were Detective Delaney and Delaney's superior, Detective John Liddy, both members of the New Jersey State Police. In 1977, from approximately January to September, Detective Delaney posed, in an undercover capacity, as the Vice-President and part owner of the Alamo Transportation Company (P.7).

Detective Delaney, at the time he testified and during the time he served in his undercover capacity, was married to Joann Schwab (P.9). Prior to the trial, Delaney learned that his new wife had had a prior meretricious relationship with petitioner. Indeed, during one of the meetings with petitioner, while Delaney was in his undercover capacity, and while several other individuals were present,

petitioner, who had no idea that Delaney was then married to Mrs. Schwab, spoke about his prior "relationship" with Joann Schwab in essentially locker-room terms. At that time, petitioner noticed that Delaney reacted rather strangely to petitioner's remarks (P.8). Petitioner learned later that it was not uncommon for Delaney to experience violent jealous rages where issues concerning his wife were concerned (P.10).

As alleged in the petition below, the conflict was created by the fact that Mr. Hayden had previously represented Delaney's wife in a custody matter following the dissolution of her former marriage. Indeed, Mr. Hayden's representation had apparently come about as a result of Detective Delaney's recommendation (P.17). Petitioner also learned that Mr. Hayden had previously represented another individual who had participated in the Project Alpha investigation, namely John Liddy, Delaney's superior (P.20).

The coincidental interrelationship between these individuals, however, was never disclosed to petitioner by his own counsel, Dennis McAlevy, even though Mr. Hayden played a decisive role in assisting petitioner's counsel during the trial; even though Delaney, as a government undercover operative, was a key witness against him; even though petitioner's counsel was himself aware of the conflict for some time; and even though both Mr. McAlevy and Mr. Hayden knew that Delaney would be called by the government to testify (P.28).

Mr. Hayden was responsible for the most critical tactical decision made at trial when he concluded that Delaney should not be cross-examined concerning his bias against the petitioner. In this regard, it is crucial to point out that Delaney's testimony was largely, if not completely, subjective (P.14, P.19). It was that testimony, replete with references to situations in which he attached his subjective understanding to impart an incriminating meaning

to otherwise innocent conversations and events which provided the critical link between petitioner and his co-defendants (P.41).[3] The importance of such testimony might have been drastically undermined by challenging the credibility of the witness with evidence of bias. Nevertheless, petitioner's counsel, on the advice of Mr. Hayden, failed to do so.

(2)

Additionally, the circumstances surrounding the government's illegal use of electronically intercepted communications at trial are also crucial to this petition. Specifically, petitioner alleged below that numerous communications implicating the petitioner were intercepted pursuant to a state wiretap order which authorized electronic surveillance of conversations relating to certain specifically enumerated state crimes (P.48).

Tapes of the conversations were used against petitioner in a federal trial in the United States District Court for the District of New Jersey (in which he previously had been charged with extortion) (P.48). They were also introduced by the government in the court below, during the petitioner's trial on federal racketeering charges. Indeed, in both federal cases, the government's proof at trial against petitioner consisted almost entirely of the tapes made pursuant to state court wiretap order.

The government wholly and completely failed to obtain an amendment of the wiretap order pursuant to 18 U.S.C. § 2517(5). Even though the government failed to obtain

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[3] An examination of the trial transcript (hereinafter T.) at pages 8343 through 8414, highlights the subjectivity of Officer Delaney's responses. *See* T. 8361, 8388 (Delaney's assumptions concerning his introduction by Larry Ricci to another individual he understood to be Mr. Fiumara). *See also* T. 8421-23 (Delaney's interpretation of what Mr. Fiumara's recorded statements meant, establishing petitioner's control and influence over Alamo Transportation Company).

a valid wiretap order, at the time of the trial, petitioner was assured by his counsel that all possible legal objections to the introduction of the evidence obtained pursuant to the wiretap order had been made (P.24). Obviously, the proper objections under 18 U.S.C. § 2517(5) had not been made by petitioner's trial counsel. Thus, petitioner's conviction was in part obtained by the introduction of evidence obtained pursuant to illegal wiretapping by the government; evidence which, had petitioner been effectively represented, would have been excluded from the trial.

REASONS FOR GRANTING THE WRIT

POINT I

Counsel's Failure to Reveal to Petitioner a Significant Conflict of Interest With Respect to a Key Government Witness and Counsel for a Co-Defendant, Deprived the Petitioner of His Sixth Amendment Constitutional Right to the Effective Assistance of Counsel.

The Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. More than fifty years ago, this Court made it clear that this fundamental guarantee entitled every defendant to the "effective and substantial" assistance of counsel. *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932).

The Sixth Amendment right to the effective assistance of counsel consists of two companion rights: First, the right to counsel of reasonable competence (*see, e.g., McMann* v. *Richardson*, 397 U.S. 759, 770-71 (1970); and second, the right to representation that is free from conflicts of interest (*see, e.g., Wood* v. *Georgia*, 450 U.S. 261, 271 (1981)). It is this latter right which petitioner submits was violated in this case when attorney Hayden,

hopelessly conflicted by his prior representation of the witness Delaney's wife, convinced McAlevy, petitioner's counsel, not to cross-examine Delaney on the issue of his personal bias against petitioner.

In the landmark case of *Glasser* v. *United States*, 315 U.S. 60 (1942), this Court established that the Sixth Amendment ensures conflict-free representatioin: that is, it entitles every criminal defendant to be represented by counsel whose loyalties are undivided and whose advocacy and zeal are unimpaired and untrammeled. 315 U.S. at 70. The meaning accorded the Sixth Amendment in *Glasser* is now firmly entrenched in constitutional jurisprudence and has been repeatedly reaffirmed. *See, e.g., Wood* v. *Georgia, supra, Cuyler* v. *Sullivan*, 446 U.S. 335 (1980); *Holloway* v. *Arkansas*, 435 U.S. 475, 483 n. 5 (1978) (Sixth Amendment affords every defendant the right to "the assistance of an attorney unhindered by a conflict of interests").

In the instant proceeding, attorney Hayden was clearly obligated to provide the petitioner with conflict-free representation just as if he were Mr. Fiumara's own counsel. *Cf. United States ex rel. Sullivan* v. *Cuyler*, 593 F.2d 512, 519 (3d Cir. 1979), *vacated and remanded on other grounds sub. nom Cuyler* v. *Sullivan*, 446 U.S. 335 (1980) (attorney who was part of defense team owed defendant "all duties an attorney owes to a client in a criminal case," notwithstanding that he was only assisting defendant's chief counsel). Indeed, as this Court has stated, "[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Cuyler* v. *Sullivan*, 446 U.S. at 346 (footnote omitted).

Indeed, in *Cuyler* v. *Sullivan, supra*, this Court acknowledged the need for establishing guidelines for the appellate review of claims due to counsel's conflicting loyalties. Specifically, in *Cuyler*, the Court held that, in the context

of multiple representation, defendants who contend that their Sixth Amendment rights have been violated, must demonstrate that "an *actual* conflict of interest adversely affected his lawyer's performance." *Id.* at 348 (emphasis added; footnote omitted). In a subsequent decision a year later in *Wood* v. *Georgia, supra,* 450 U.S. at 273, the Court vacated the judgment below and remanded the case for a hearing to determine whether the conflict strongly suggested by the record existed at the time of the initial proceeding or earlier. The Court held that, if on remand, the court below found that an actual conflict of interest existed, and no valid waiver was made, a new proceeding would be required "untainted by a legal representative serving conflicting interests." 450 U.S. 273-74.

The court of appeals engaged in a rationale expressly prohibited by the decisions of this Court in finding that the only benefit to be gleaned from cross-examining Delaney was:

> the possibility that Delaney would flare up, something that was hardly likely in the case of a trained police officer giving testimony in court, whatever his private reaches would be. Even if he did engage in a courtroom outburst, the jury might think it justified. On the more likely hypothesis that Delaney would retain his calm, the jury's reaction to Fiumara's dragging the name of a woman with whom he had been sexually intimate into a criminal trial, simply for purposes of impeachment, could have been extremely adverse A. 7a, 8a).

That is to say, over 40 years ago in *Glasser* v. *United States, supra,* 315 U.S. at 75-76 this Court cautioned against such speculation:

> To determine the precise degree of prejudice sustained . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too funda-

> mental and absolute to allow courts to indulge in nice calculations as to the amount arising from its denial.

In that regard, notwithstanding the critical role Hayden did have in determining the strategy for petitioner's defense and, in particular, the decision not to cross-examine Delaney, if the petitioner had known about Mr. Hayden's previous relationship with a key government witness, he would not have permitted Mr. Hayden to participate *at all* in the organization and structure of his defense—and he certainly would not have heeded the advice of his own counsel, Mr. McAlevy, who recommended that his co-defendant, Michael Coppola, retain Mr. Hayden (P.11).

In finding that no conflict of interest existed, the court of appeals deprived petitioner of a critical constitutional right, jealously guarded by the decisions of this Court in preserving the integrity of the criminal justice system. For example, in *Glasser* v. *United States, supra,* this Court stated that (315 U.S. at 70):

> [T]he Sixth Amendment contemplates that such assistance [of counsel] be untrammeled and unimpaired. . . . *If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired* (citation omitted; emphasis added).

Here, the impact of the alleged conflict of interest was clear and resulted in demonstrable prejudice to the petitioner. Indeed, the facts alleged in the petition showed an "actual conflict" as required under *Cuyler* and *Wood.* Even the court of appeals had to concede that Hayden's participation was not "wholly disinterested" (A. 7a). Mr. Hayden played a uniquely influential role in structuring petitioner's defense and determining that a key government witness should not be cross-examined concerning his bias against the petitioner. Consequently, the jury was never made aware of Delaney's deep-seated bias. That information would have impacted upon the extent they

would have believed and the weight they would have accorded Delaney's testimony.

Thus, in view of the fact that the decision below does not comport with decisions of this Court protecting petitioner's right to the effective assistance of counsel, and recognizing the unique conflict that permeated the defense camp, it is incumbent upon this Court to now vindicate petitioner's Sixth Amendment rights.

POINT II

The Use at Petitioner's Trial of Conversations Electronically Intercepted in Plain Violation of the Amendment Requirement of 18 U.S.C. § 2517(5) Should Not Have Been Countenanced by the Court of Appeals; the Failure of Trial Counsel to Object to the Use of Those Conversations Was Not a Waiver But Just Another Example of How Petitioner Was Deprived of His Sixth Amendment Right to the Effective Assistance of Counsel.

Petitioner's claim that the government's failure to amend the wiretap order to include the crimes enumerated in this indictment was in contravention of the requirements of 18 U.S.C. § 2517, merits the attention of this Court for several reasons. First, in denying petitioner's claim because the government's omission did not result in a "miscarriage of justice," the Court misapplied the standard enunciated by this Court in *Hill* v. *United States*, 368 U.S. 424, 428 (1962). In this regard, the court of appeals acted in discordance with decisions of this Court safeguarding the individual liberty interest potentially at risk through the use of electronic surveillance. Second, the government's failure to amend the order as required by statute and the court of appeals implicit approval of that practice, presents a significant federal question which should be settled by this Court. Finally, in holding that petitioner waived his right to object to the illegal evidence, the court of

appeals erroneously failed to recognize that the issue had never been raised because of the ineffective assistance of petitioner's counsel.

A. *The Court of Appeals Erroneously Refused to Entertain Petitioner's Claim That Conversations Were Illegally Intercepted and Introduced at His Trial.*

This Court has consistently applied the standard set forth in *Hill* v. *United States, supra,* to determine the scope of habeas corpus relief for nonconstitutional violations. *See, e.g., United States* v. *Timreck,* 441 U.S. 780 (1979) (finding that violation of Rule 11 not cognizable in petition for habeas corpus, because it did not satisfy the *Hill* standard); *Davis* v. *United States,* 417 U.S. 333 (1974) (defendant convicted for an act that the law did not make criminal; on petition for habeas corpus relief, conviction set aside as "a complete miscarriage of justice" under *Hill*). Under *Hill,* the appropriate inquiry is whether the asserted violation constituted "a fundamental defect which inherently result[ed] in a complete miscarriage of justice." 368 U.S. at 428.

Because this case involves the government's complete failure to comply with, and flagrant disregard of, one of the primary provisions governing the use of wiretap evidence, the amendment requirement, it was plainly "an error of the character and magnitude cognizable under a writ of habeas corpus." *Hill* v. *United States, supra,* 368 U.S. at 428. It is respectfully asserted that the court of appeals erred in determining that the government's acts, in blatant disregard of the requirements imposed in 18 U.S.C. § 2517(5), involved a mere "technicality" and were thus not cognizable in a habeas corpus petition under *Hill* (A. 10a). As set forth, *infra,* the decisions of this Court evince a strong desire to safeguard the liberty interest at stake with the use of electronic surveillance. Further, because petitioner's conviction was obtained almost entirely on the basis of illegally seized evidence, it is difficult to

ascertain how the illegal seizures did not result in a complete miscarriage of justice.

Although not every violation of the myriad provisions contained in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, *et seq.* (hereinafter "Title III") will justify habeas corpus relief,[4] the violation at issue herein can be set apart from the cases finding merely technical defects on several grounds. First, 18 U.S.C. § 2517(5) makes it unequivocally clear that an amendment order *was* required under the circumstances of this case. Secondly, 18 U.S.C. § 2515 is equally clear in interdicting the use of communications when such disclosure would be in violation of Title III. Finally, in view of the Second Circuit's unwavering position, as expressed in *United States* v. *Marion*, 535 F.2d 697 (2d Cir. 1976), considered *infra*, that strict compliance with Title III's amendment provision is required, it is simply undeniable that the violation of Title III at issue here, rendered petitioner's conviction fatally defective and resulted in a complete miscarriage of justice.

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[4] For example, in *Llamas-Almaguer* v. *Wainwright*, 666 F.2d 191 (5th Cir. 1982), the court of appeals held that the alleged violation of Title III at issue—the lack of a full and complete statement pursuant to 18 U.S.C. § 2518(c) as to whether alternative investigative procedures had been tried and failed or why they appeared to be unlikely to succeed or too dangerous—did not justify habeas corpus relief. In reaching that conclusion, the court of appeals noted that the Title III requirement was violated "if at all, not by complete omission or flagrant disregard, but by marginal inadequacy." 666 F.2d at 194.

Self-evidently, the case at bar stands in sharp contrast to *Llamas-Almaguer*. This case does not involve a "marginal inadequacy" but rather the government's complete failure to comply with the express provisions of the statute and the subsequent introduction of such illegal evidence in direct contravention of 18 U.S.C. § 2515.

B. *The Court of Appeals Decision Is Inconsistent With Relevant Principles Regarding Electronic Surveillance Enunciated by This Court.*

The court of appeals opinion, rejecting petitioner's claim that the government's failure to amend its wiretap order rendered the evidence inadmissible in violation of 18 U.S.C. § 2517(5), is inconsistent with principles articulated by this Court. Specifically, the decision ignores those principles concerning the extent to which the procedural safeguards protecting individual liberty must be complied with.

More than fifty years ago, Justice Brandeis aptly observed that "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping." *Olmstead* v. *United States*, 277 U.S. 438, 476 (1928) (Brandeis, *J.*, dissenting). The decision in *Olmstead* was quoted with approval in *United States* v. *Gigante*, 538 F.2d 502, 503 (2d Cir. 1976) (Kaufman, *Ch.J.*). The fear that overzealous law enforcement officials would use electronic surveillance in such a manner as to erode rights of privacy prompted Congress to enact Title III, a comprehensive wiretapping statute containing detailed procedures and specific restrictions. Title III explicitly provides, in 18 U.S.C. § 2515, that the contents of oral or wire interceptions, or any derivative evidence, may not be used when disclosure would be in violation of the provisions contained in Title III. This section thus imposes a general evidentiary prohibition designed to compel compliance with all of the statutory restrictions. *Gelbard* v. *United States*, 408 U.S. 41, 48-50 (1972). *See also* S.Rep.No. 1097, 90th Cong., 2d Sess. 96 (1968) *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112.

The government's failure to comply with the restrictions set forth in 18 U.S.C. § 2515, overlooked by the trial court, and summarily treated by the court of appeals, requires the attention of this Court to harmonise the decision in this case with principles articulated by this Court.

As previously stated by this Court, "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger* v. *New York*, 388 U.S. 41, 63 (1967).

The threat referred to in *Berger* has come to fruition in this case. The "sufficient reasons" posited by the court of appeals for rejecting petitioner's claims are not an acceptable basis for ignoring the clear and specific requirements of 18 U.S.C. § 2517(5) and the threat outlined in *Berger*.

The court of appeals decision is also a stark reminder of the concerns expressed by Justice Douglas in his dissenting opinion in *Cook* v. *United States*, 401 U.S. 996, 998 n. 6 (1971) (Douglas, *J.* dissenting),[4] in which he dissented from the Court's decision to deny issuance of a writ of certiorari:

> There is the initial question whether any intercepted communications relating to the offense of which petitioner was convicted are evidence of "offenses other than those specified in the order of authorization or approval," §2517(5). If so, "Such contents and any evidence derived therefrom may be used [as testimony at trial] when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter." This would seem to place upon the Government the burden of knowing the source of its evidence, even without challenge from a defendant.

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[4] The facts in *Cook* v. *United States*, *supra*, did not squarely invoke 18 U.S.C. § 2517(5). Rather, the case involved the alleged failure of the government to unequivocally state whether or not they had employed any eavesdropping devices to obtain evidence. In discussing the spectrum of potential issues raised, Justice Douglas also addressed the requirements of 18 U.S.C. § 2517(5).

Thus, the decision of the court of appeals denying petitioner's claim that the government acted in direct contravention of 18 U.S.C. §2517(5), does not comport with the concerns expressed by this Court. As previously stated by the Second Circuit Court of Appeals, in *United States* v. *Marion, supra,* by enacting the comprehensive wiretap provisions contained in Title III, Congress intended "[t]o guard against the realization of Orwellian fears and conform to the constitutional standards for electronic surveillance elaborated in *Katz* v. *United States,* 389 U.S. 347 (1967) and *Berger* v. *New York,* 388 U.S. 41 (1967)." The decision sought to be reviewed herein is inconsistent with this firmly entrenched practice of protecting individual liberty by requiring strict compliance with the requirements of Title III.

C. *The Court of Appeals Decision Is Inconsistent With the Requirements of 18 U.S.C. § 2517(5) and Case Law Articulating Those Requirements.*

The principles and concerns set forth above are stated in direct terms in 18 U.S.C. § 2517(5) wherein there is an express requirement that the government amend wiretap orders before incidentally intercepted communications may be disclosed or used at trial. 18 U.S.C. § 2517(5) provides:

> When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with

> the provisions of this chapter. Such application shall be made as soon as practicable.

As stated *infra*, these requirements have been steadfastly applied by the federal circuit courts of appeals that have been confronted with this provision.

In view of the magnitude of the liberty interest at issue herein, petitioner's claims present important issues of federal law. Petitioner respectfully submits that the Supreme Court should enforce the clear and unequivocal strictures contained in 18 U.S.C. § 2517(5), and thereby render the government's illegally obtained evidence at bar inadmissible.

The Second Circuit rejected petitioner's claim below despite its recent holding in the seminal case of *United States* v. *Marion, supra*. The court's departure from the policies set out in *Marion*, stressing compliance with the amendment requirement of 18 U.S.C. § 2517(5), is completely inexplicable. In discussing the purpose of the amendment provision of 18 U.S.C. § 2517(5), Chief Judge Kaufman, speaking for the Second Circuit in *Marion*, stated that when a conversation is intercepted which does not relate to an offense designated in the wiretap order,

> [a] subsequent application must be made to a judge of competent jurisdiction—who shall thereupon determine the good faith of the original application before permitting disclosure or use of the incidentally intercepted communications.

Id. at 700 (quoting S.Rep. 1097, 90th Cong., 2d Sess., at 12 *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2189).

Specifically, the *Marion* court ruled that the government's failure to comply with the amendment provision of 18 U.S.C. § 2517(5) required reversal of the defendant's conviction. Further, the court noted that Title III contains

procedures and specific restrictions and that strict compliance with the strictures imposed by the statute is essential in order to effectuate these salutary statutory purposes. Thus, since the federal crimes for which the defendant was indicted in *Marion* were "offenses other than those specified" in the wiretap order, the court concluded that § 2517(5) plainly required the government to obtain subsequent judicial approval for the interception of communications relating to that federal offense for which they ultimately sought and obtained an indictment. Because the government in *Marion*, as here, conspicuously failed to do so, the court concluded that suppression of the intercepted conversation was required.

The *Marion* court, in arriving at its decision relied on the Seventh Circuit's decision and reasoning in *United States* v. *Brodson*, 528 F.2d 214 (7th Cir. 1975). In *Brodson* a unanimous panel held that 18 U.S.C. § 2517(5) requires that an amendment order be obtained as soon as practicable regardless of whether the intercepted communications also relate to offenses specified in the original wiretap order.

In the case at bar, the court of appeals ignored the clear requirements of 18 U.S.C. § 2517(5) and the interpretation of that provision expressed in both *Marion* and *Brodson*.[4] Thus, an important question of federal law has been presented, which in light of the fact that the decision below is inconsistent with the court of appeals prior holding in *Marion*, must finally be settled by this Court.

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[4] The Second Circuit's decision is, therefore, in conflict with the rule established in the Seventh Circuit in *Brodson*. Indeed, since its decision in *Marion*, the Second Circuit has steadfastly refused to retreat from this position, despite the fact that it has been invited to do so. *See, e.g., United States* v. *Masciarelli*, 558 F.2d 1064 (2d Cir. 1977). The court's instant retreat from this posture is completely inexplicable.

D. *Petitioner Was Rendered Ineffective Assistance of Counsel When His Trial Counsel Failed to Raise an Obvious and Meritorious Pretrial Suppression Motion With Respect to the Intercepted Conversations.*

The court of appeals rejected petitioner's argument in part on the ground that in order to be timely, a motion to suppress evidence must be made prior to trial or a waiver will be deemed to have occurred. Fed.R.Crim.P. 12(b)(3); Fed.R.Crim.P. 12(f). In addition, the court found that a defendant seeking collateral relief despite procedural defaults must demonstrate "cause" excusing his defaults and "actual prejudice" resulting therefrom. *See United States* v. *Frady*, 456 U.S. 152, 168 (1982).

This finding ignores the fact that counsel's failure to make pretrial suppression motions further buttressed petitioner's claim alleging deprivation of his sixth amendment right to effective assistance of counsel. Thus, not only did petitioner's counsel fail to cross-examine a critical witness as to his bias, he also failed to raise an obvious pretrial motion. In denying petitioner's claim, the court of appeals failed to consider that petitioner's conviction was obtained almost entirely on the basis of the government's illegal wiretap evidence. Additionally, in refusing to recognize petitioner's claim, the court of appeals offered a reason that was not only irrelevant, but which also totally misconstrued petitioner's conflict claim. The court stated that the decision not to object was the type of joint decision supposedly dominated by Hayden, "whose competence Fiumara has extolled" (A. 11a). This suggestion has no bearing upon the determination as to whether a cognizable claim was established that critical evidence was illegally obtained, introduced unlawfully at trial, and arguably was the primary reason for petitioner's conviction.

Although, Fed.R.Crim.P. 12(b), requires that motions to suppress evidence be made prior to trial and Rule 12(f) provides that the failure to raise such objections prior to trial may operate as a waiver of the right to

challenge the admissibility of the evidence on that ground, Rule 12(f) further states that "the court for cause shown may grant relief from the waiver." It is respectfully asserted that the failure of petitioner's trial counsel to provide effective assistance in the present case, as demonstrated by his failure to make an obvious and meritorious pretrial suppression motion, constitutes the requisite showing of "cause" required by Rule 12(f).[7]

The standard on collateral attack for determining whether or not an accused has had effective assistance of counsel in the federal circuit courts of appeals is the "reasonable competence" standard. *See Trapnell* v. *United States*, No. 82-2025, slip op. at 629, 641 (2d Cir. December 9, 1983) (and cases cited therein). Counsel's complete failure to

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[7] The requisite "cause" to be established by petitioner for excusing a procedural default has been established, as the mistakes of counsel were so egregious as to amount to a Sixth Amendment violation. *See United States* v. *Indiviglio*, 612 F.2d 624, 631 (2d Cir. 1979), *cert. denied*, 445 U.S. 933 (1980). Although the court in *Indiviglio* found that the defense counsel's errors did not, in that case, constitute ineffective assistance of counsel, it expressly reserved decision on the question "whether incompetence of counsel ever will suffice to establish cause for failure to assert a claim such as would relieve the client of the normal consequences of that failure." 612 F.2d at 631 n. 13.

The Fifth Circuit expressly answered this question in the affirmative in *Sincox* v. *United States*, 571 F.2d 876 (5th Cir. 1978), where counsel's failure to object during the poll of the jury at petitioner's trial, when a juror indicated that he had a reasonable doubt as to petitioner's guilt, was deemed to be "an inexcusable mistake of grand proportion." The court reasoned that the petitioner was unequivocally denied the effective assistance of counsel. Significantly, in so holding, the court stated that counsel's ineffectiveness supplied a sufficient showing of cause to excuse the procedural default that occurred.

Thus, the critical inquiry when determining whether "cause" exists in this case is whether counsel's failure to object to the introduction of the wiretap evidence amounted to a violation of the petitioner's Sixth Amendment rights. Under the standard enunciated by the Second Circuit in *Indiviglio* and subsequently applied by the Fifth Circuit in *Sincox*, counsel's failure to provide effective assistance in this case excuses the procedural default and thus ceases to operate as a bar to the remedy sought herein.

make the necessary pretrial motions, especially in light of the fact that he assured petitioner that all legal objections had been made, falls far below the "reasonable competence" standard. In a word, petitioner established cause for excusing the default of his trial counsel.

CONCLUSION

For the foregoing reasons, we respectfully pray that a writ issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: March 26, 1984
New York, New York

Respectfully submitted,

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LaRossa, Axenfeld & Mitchell
Of Counsel

APPENDIX

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 464—August Term 1983

(Argued: December 15, 1983 Decided: January 26, 1984)

Docket No. 83-2260

TINO FIUMARA,

Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

FEINBERG, *Chief Judge,*
FRIENDLY and OAKES, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Leonard B. Sand, *Judge,* denying without an evidentiary hearing a motion of appellant Fiumara under 28 U.S.C. § 2255 to vacate his convictions for racketeering activities in the waterfront business in New York and New Jersey, see *United States v. Clemente,* 494 F. Supp. 1310 (S.D.N.Y. 1980), *aff'd,* 640 F.2d 169 (2 Cir.), *cert. denied,* 454 U.S. 820 (1981), on the grounds of lack of effective assistance of counsel

and the admission of wiretap evidence allegedly obtained in violation of 18 U.S.C. § 2517(5). Affirmed.

JAMES M. LAROSSA, New York, New York (John W. Mitchell, Karen F. Silverman, LaRossa, Axenfeld & Mitchell, New York, New York), *for Petitioner-Appellant.*

BRUCE A. GREEN, Assistant United States Attorney for the Southern District of New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Aaron R. Marcu, Barry A. Bohrer, Assistant United States Attorneys), *for* Respondent-Appellee.

FRIENDLY, *Circuit Judge*:

Appellant Tino Fiumara was convicted in 1980 along with others, after an eleven week trial before Judge Sand and a jury in the District Court for the Southern District of New York, see *United States* v. *Clemente*, 494 F. Supp. 1310, of numerous offenses, including extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, receiving bribes in violation of the Taft-Hartley Act, 29 U.S.C. § 186(b), conducting and conspiring to conduct an enterprise's affairs through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Orzanization Act (RICO), 18 U.S.C.. §§ 1962(c) and (d), and filing false income tax returns in violation of 26 U.S.C. §§ 7201 and 7206(1). As said in our opinion affirming the convictions, *United States* v. *Clemente*, 640 F.2d 1069, 1071 (2 Cir.), *cert. denied*, 454 U.S. 820 (1981), the case concerned "racketeering activity that had plagued waterfront businesses in New York and New Jersey". A list of the seventy-four

counts on which Fiumara was found guilty and of the sentences imposed is appended to that opinion, *id.* at 1084. Fiumara's sentences to twenty-five years imprisonment and a $10,000 fine on the RICO conspiracy counts and five years imprisonment and a $5,000 fine on the income tax counts, were imposed consecutively to a sentence of twenty years imprisonment and a $10,000 fine imposed in June 1979 by the District Court of New Jersey for extorting money from a restaurant owner by acts and threats of violence, *United States* v. *Fiumara*, No. 79-2385, aff'd mem., 620 F.2d 290 (3 Cir.), *cert. denied*, 449 U.S. 832 (1980).

Represented by new counsel, Fiumara filed a motion in the district court under 28 U.S.C. § 2255 to have his convictions set aside. The motion, which was prepared in disregard of Rule 2(b) of the Rules Governing Section 2255 Proceedings,[1] alleged as grounds "Denial of effective assistance of counsel in that a conflict of interest existed between counsel, myself and a witness for the prosecution. See attached Statement of Facts—Point I" and "Denial of Effective Assistance of Counsel in that movant was convicted on evidence introduced in violation of 18 U.S.C. § 2517(5) and § 2515." Jt. App. at 5. The attached Statement of Facts extends in tiresome detail over twenty-three pages including many matters of which Fiumara could have no personal knowledge and which are unsupported

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[1] This rule requires, with an exception not here pertinent, that the motion shall be in "substantially the form annexed to these rules". Paragraph 12 of the form says:

> State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. . . .

(Emphasis in original).

The portion of the form providing for the specification of grounds adds:

> Supporting FACTS (tell your story *briefly* without citing cases or law.)

(Emphasis in original).

by affidavits, and Point I of the memorandum incorporated in the motion consumes twenty-one pages and is studded with references to cases. Also Point II of the memorandum is not limited to the ineffective assistance of counsel in connection with the wiretap evidence alleged in the motion but asserts the violation as an affirmative ground, as does Fiumara's brief in this court. Choosing to overlook these procedural irregularities, Judge Sand denied the motion in a memorandum endorsement, and this appeal followed.

Fiumara's conflict of interest claim is an unusual one. A witness against Fiumara—not, as he alleged in the district court, the principal witness against him, see 494 F. Supp. at 1319-20[2]—was Robert J. Delaney, a detective with the New Jersey State Police. Delaney's role at trial was to read the transcripts of telephone conversations obtained from wiretaps authorized by a New Jersey state judge for use in an unrelated joint investigation conducted by the New Jersey State Police and the FBI designated as "Project Alpha" which led to Fiumara's New Jersey conviction mentioned above and, in some instances, to interpret "code" language in them. Sometime during the winter of 1974-1975, Fiumara allegedly met a fashion model, Joann Schwab, who had been married to Pat Napitano. By the time of this meeting the Schwab-Napitano marriage had broken up, due in part of Napitano's incarceration, and proceedings had been instituted to dissolve it and to make provision for custody and visitation rights of their daughter, Danielle. The meeting allegedly led to a romantic relation-

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[2] In his memorandum endorsement Judge Sand properly rejected this unfounded allegation, saying:

> Above all, [Fiumara] exaggerates the significance of Officer Delaney's testimony. It is simply not the case that this officer's testimony was the principle [sic] evidence against Fiumara. . . . [T]he evidence against Fiumara was overwhelming and the Delaney testimony . . .cannot fairly be said to have played a major role at the trial.

ship bween Schwab and Fiumara which lasted for some six months.

In the course of the investigation that led to the New Jersey conviction mentioned above, Fiumara, on April 11, 1977, made the acquaintance of Delaney, then acting in an undercover capacity as Robert Covert. In a conversation between them and two others after dinner on a later occasion the men began to talk about their relations with women, with Fiumara contributing an account of his liaison with Ms. Schwab. Covert seemed somewhat disturbed at the revelation. Later Fiumara learned from another man that, after the end of his affair with Schwab, Delaney had married her. When Fiumara "confronted Robert Delaney several times with the information" and mentioned Joann Schwab's name—just why is not explained—"Delaney became enraged". There were also allegations that Delaney was an extremely jealous and even violent husband.

At the trial in the district court Fiumara was represented by attorney Dennis McAlevy. When Fiumara engaged McAlevy, he asked the latter to recommend a lawyer to represent his co-defendant Michael Copolla. McAlevy recommended Joseph Hayden, Jr. The recommendation was accepted. Moreover, the memorandum incorporated in the motion alleged that

> [i]n addition, it was agreed between defendants (principally Mr. Fiumara and Mr. Copolla) that the motion practice and legal work would be handled essentially by Mr. Hayden, since Mr. McAlevy was confident of his abilities in this area, and that all submission[s] which were made to the Court would be joint motions offered on behalf of both Mr. Fiumara and his co-defendant, Michael Copolla.[3]

Jt. App. at 19.

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[3] The memorandum added, "Indeed, as this Court may very well recall, Mr. Hayden was appointed 'lead counsel' by the Court in this case." Jt. App. at 20. Judge Sand's recollection and finding were to the contrary.

The memorandum goes on to assert that

> [f]or the purposes of the instant motion, the most important "joint decision" which was made involved the question of whether or not the government's witness Robert Delaney should be cross-examined concerning his bias against Mr. Fiumara as a result of his knowledge of the prior romantic relationship between his wife and movant[;]

that Fiumara discussed this with Hayden on several occasions; and that on one of these Fiumara pointed out to counsel that since Delaney was going to offer "subjective analysis" of the tapes from the New Jersey investigation, "cross-examination as to this bias and even his prior history of jealousy might very well convince the jury to reject his testimony"; but that "both counsel agreed that it would not be appropriate to cross-examine Office[r] Delaney on this issue." Jt. App. at 20, 21.

Now for the alleged conflict of interest. In 1977 Hayden had represented Ms. Schwab in a dispute with Napitano regarding the custody of their daughter Danielle. In 1979 Hayden again represented Ms. Schwab in a dispute over Danielle's custody, this time with Napitano's parents. The argument is that as a result of this representation Hayden had a duty to or may at least have formed a liking for Ms. Schwab; that public disclosure of her affair with Fiumara would be embarrassing to her and might even lead to a violent outbreak by Delaney; that Hayden thus had an ulterior motive for desiring that Delaney not be cross-examined with respect to the Schwab-Fiumara liaison; and that McAlevy, who did not disclose his knowledge of Hayden's representation of Ms. Schwab to Fiumara, simply rubber-stamped Hayden's decision.

It is by no means clear that even if Hayden rather than McAlevy had represented Fiumara, there would have been

a conflict of interest. The motion does not allege except by innuendo that Hayden had ever represented Delaney, the witness to be cross-examined. Nothing suggests that his knowledge of Ms. Schwab's intimate relationship with Fiumara came as a result of a confidential communication from her; apparently he learned of this from either Fiumara or Delaney. The mere fact, if it be one, that he had come to like Ms. Schwab as a result of his representation, would not give rise to a conflict under this court's decision in *United States* v. *McClean*, 528 F.2d 1250, 1258 (2 Cir. 1976), where we said:

> A trial counsel worthy of the name should be capable of subordinating his personal predilections to his professional duty.

Indeed, *McClean* would be *a fortiori*, since there the attorney had represented the witness—not, as here, the witness' wife.

However all this may be, Fiumara's lawyer was McAlevy, not Hayden. The lengthy memorandum incorporated in the § 2255 motion does not allege that McAlevy delegated to Hayden the decision whether or not to cross-examine Delaney in regard to Fiumara's affair with Schwab preceding her marriage to Delaney—a delegation that would have violated his professional duty. The most that can be eked out in Fiumara's favor is that Hayden participated in the conference at which it was decided not to cross-examine Delaney on the Schwab-Fiumara's affair and that, for the reason indicated, his advice may not have been wholly disinterested, as McAlevy (although not Fiumara) knew. But the final decision rested with McAlevy and Fiumara, not with Hayden. There were the strongest tactical reasons not to press this line of attack. Its only hope of benefit was the possibility that Delaney would flare up, something that was hardly likely in the case of a

trained police officer giving testimony in court, whatever his private reaction would be. Even if he did engage in a courtroom outburst, the jury might think it justified. On the more likely hypothesis that Delaney would retain his calm, the jury's reaction to Fiumara's dragging the name of a woman with whom he had been sexually intimate into a criminal trial, simply for purposes of impeachment, could have been extremely adverse.

Even in cases of multiple representation, "the possibility of conflict is insufficient to impugn a criminal conviction . . . a defendant must establish that an actual conflict of interest affected his lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980). Here McAlevy subjected Delaney to vigorous cross-examination; the strong likelihood is that introducing the subject of Fiumara's relations with the future Mrs. Delaney would have made his case even weaker than it was. In sum, Fiumara has failed to establish either that there was a conflict or that any conflict affected his lawyer's performance in any significant way.

As indicated, Fiumara's wiretap claim is now rested both on substantive grounds and on ineffective assistance of counsel, although only the latter was alleged in the § 2255 petition. The claim is based on 18 U.S.C. § 2517(5), which provides as follows:

> When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when author-

ized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

In 1977, as part of the investigation by the New Jersey State Police referred to above, the police and one Patrick Kelly operated the Alamo Transportation Co. as an undercover trucking operation. On June 28, 1977, New Jersey Superior Court Judge Schoch signed an order permitting interceptions of telephone conversations at the Alamo office in Jersey City, New Jersey. Among the conversations recorded were six conversations of three of Fiumara's co-conspirators in which they incriminated him.[4] In September 1979 Julian Wilsey, a New Jersey Deputy Attorney General, made an application to Judge Schoch. After referring to the judge's 1977 order, Wilsey stated that he had received a call from an Assistant United States Attorney for the Southern District of New York, in which the Assistant advised that he had learned that one of the tapes recorded as a result of the judge's interception order contained conversations helpful to the Government's case in *United States* v. *Clemente*. Wilsey sought permission to have the New Jersey State Police prepare a copy of the tape recording and transport the original to the office of the United States Attorney for the Southern District of New York, where a member of the FBI would take custody of it for the purposes of inspection by the defendants in *United States* v. *Clemente* and attempt to filter, enhance and copy the tape, whereupon the New Jersey State Police would transport the original back to New Jersey for resealing. Judge Schoch made an order dated September 27,

[4] These were the same transcripts that were interpreted by Delaney.

1979, accordingly. No objection to the use of the tape was made before or during the *Clemente* trial or on the appeal to this court.

Fiumara's claim is that Judge Schoch's 1979 order did not comply with 18 U.S.C. § 2517 as construed in *United States* v. *Marion*, 535 F.2d 697, 700 (2 Cir. 1976), in that the order did not find that the wiretaps "were otherwise intercepted in accordance with the provisions of this chapter." The Government argues that the deficiency was merely formal and that the 1979 order was sufficient under the principle of implicit authorization recognized in *United States* v. *Tortorello*, 480 F.2d 764, 781-83 (2 Cir. 1973), *cert. denied*, 414 U.S. 866 (1974), in the portion of the *Marion* opinion dealing with the "Lounge order", 535 F.2d at 703, and in *United States* v. *Masciarelli*, 558 F.2d 1064, 1068 (2 Cir. 1977). Although we find substantial merit in this argument, we need not pass upon it since there are other sufficient reasons for rejecting Fiumara's claim.

The first is that Fiumara's objection is not cognizable under 28 U.S.C. § 2255 since it is neither jurisdictional nor constitutional in nature and does not constitute a "fundamental defect which inherently resulted in a complete miscarriage of justice." *Hill* v. *United States*, 368 U.S. 424, 428 (1962). See *Wright* v. *United States*, No. 83-2150 (2 Cir. Jan. 24, 1984). We have held that merely technical violations of ch. 119 of Title 18 do not rise to the *Hill* level and thus do not support collateral attack. *United States* v. *Wright*, 524 F.2d 1100, 1102 (2 Cir. 1975) (wiretap applications had not been approved as required by 18 U.S.C. § 2516); *Alfano* v. *United States*, 555 F.2d 1128, 1130-31 (2 Cir. 1977) (failure to seal wiretaps in violation of 18 U.S.C. § 2518(8)(a)).

A second reason is Fiumara's procedural default. Fed. R. Crim. P. 12(b)(3) requires that motions to suppress evidence must be made prior to trial and Fed. R. Crim. P. 12(f) provides that failure to make such a motion shall

constitute a waiver, although the court for cause shown may grant relief from the waiver. Here there not only was no pretrial motion to suppress the New Jersey tapes, of which the defendants had full knowledge, there was no objection at trial or on appeal. This is a classic case for applying the rule of *United States* v. *Frady*, 456 U.S. 152, 168 (1982), that a federal defendant seeking collateral relief despite procedural defaults—in this case three of them—must demonstrate "cause" excusing his defaults and "actual prejudice" resulting therefrom. Here there was no prejudice in the sense defined by the Court in *Frady*. The New Jersey tapes were only a small part of the overwhelming proof against Fiumara; moreover, Fiumara has shown no reason to doubt that if the alleged defect in Judge Schoch's order had been pointed out before or even during trial, a correcting order could not have been readily obtained. There was likewise no showing of cause for the three-fold failure to object to the tapes. *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), *cert. denied*, 445 U.S. 933 (1980), negates Fiumara's contention that the mere fact of failure to make a claim for suppression demonstrates ineffective assistance of counsel, and Judge Mansfield's concurring opinion in *Indiviglio, id.* at 632, shows that this rule holds under the "reasonably competent assistance" of counsel standard recently adopted in *Trapnell* v. *United States*, No. 82-2025, slip. op. at 629, 641, decided December 9, 1983. Moreover, the decision not to object to the New Jersey tapes was the kind of joint decision supposedly dominated by Hayden, whose competence Fiumara has extolled in arguing the issue of the failure to cross-examine Delaney with respect to the Schwab affair.

Affirmed.

APPENDIX B

Memorandum Endorsement

TINO FIUMARA,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

83 CIV 3635 (LBS)

This motion pursuant to 28 U.S.C. § 2255 is totally lacking in merit and is denied. Movant's contentions are based on a series of assertions which are contrary to the record which movant distorts eggregiously.

First, Joseph A. Hayden, Jr., Esq., counsel for a co-defendant in *United States* v. *Clemente, et al.,* was in no sense counsel for movant. He was not lead counsel for the defendants, who refused to designate such counsel, and acted for the defendants collectively only with respect to routine administrative matters.

Second, the fact that Hayden had previously represented the wife of a government witness (Robert J. Delaney, Detective, New Jersey State Police) in a family proceeding involving her former husband, hardly constitutes a conflict of interest vis á vis Fiumara. Many of the defendants and their counsel came from the same section of New Jersey and it is not suprising that there was some contact between them and others from that area. In any event, the decision of Fiumara's counsel not to cross-examine Officer Delaney on the subject of Delaneys' wife's prior romantic liason with Fiumara was concedely a conscious one. It was, under the circumstances, a decision which counsel might well make. The risk of antagonizing the jury was far greater than the likelihood of effectually im-

peaching the officer by showing bias or hostility. It is absurd to suggest that this decision by Fiumara's experienced and aggressive trial counsel resulted from the improper influence of Hayden prompted by his alleged conflict of interest.

Above all, the movant exaggerates the significance of Officer Delaney's testimony. It is simply not the case that this officer's testimony was the principal evidence against Fiumara. The evidence in this eleven week trial is summarized in some detail in *United States* v. *Clemente,* 494 F.Supp. 1310, 1316-1323 (1980), *aff'd* 640 F.2d 1069 (2d Cir. 1981). As that summary discloses, the evidence against Fiumara was overwhelming and the Delaney testimony (summarized, 494 F.Supp. at 1320) cannot fairly be said to have played a major role in the trial.

Regarding Fiumara's further contention concerning the alleged failure to amend the wiretap order as required by 18 U.S.C. § 2517(5), even if we assume arguendo that the issue may be raised in a habeas corpus proceeding, the contention lacks merit because (1) the application of Deputy Attorney General Julian Wilsey for use of the tapes in *United States* v. *Clemente,* implicitly satisfied the amendment requirement of § 2517(5) within the parameters set forth in *United States* v. *Masciarelli,* 558 F.2d 1064, 1068 (2d Cir. 1977), and (2) no motion to suppress was made and the point has been waived.

The assertion that trial counsel's failure to move to suppress constitutes a denial of the right to effective counsel is frivolous under any reasonable definition of that right. Finally, the tapes in question played a minor role in these proceedings.

Motion denied.

So Ordered.

Dated: New York, New York
August 9, 1983

/s/

U.S.D.J.

APPENDIX C

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Argued Nov. 5, 1980

Decided Feb. 26, 1981

Rehearing Denied April 14, 1981

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL CLEMENTE, TINO FIUMARA, THOMAS BUZZANCA, VINCENT COLUCCI, CAROL GARDNER, MICHAEL COPOLLA and GERALD SWANTON,

Defendants-Appellants.

Alan M. Dershowitz, Cambridge, Mass. (Nathan Dershowitz, Jeanne Baker, David Fine, Cambridge, Mass., of counsel, Richard Strafter, Holly Skolnick John Batter, Joann Crispi, Cambridge, Mass., on the brief), for defendant-appellant Clemente.

Carl M. Bornstein, New York City (Barry A. Bohrer, New York City, of counsel), for defendant-appellant Colucci.

Herbert O. Reid, Sr., Howard University School of Law, Washington, D.C. (William A. Borders, Jr., Washington, D.C., of counsel), for defendant-appellant Gardner.

Irving Anolik, New York City, for defendants-appellants Buzzanca, Fiumara and Copolla.

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Michael S. Devorkin, Asst. U.S. Atty., New York City (John S. Martin, Jr., U.S. Atty, for the Southern District of New York, Daniel H. Bookin, Ruth N. Glushien, Mary Jo White, Asst. U.S. Attys., New York City, of counsel), for the United States of America.

Before FEINBERG, *Chief Judge,* and FRIENDLY and MESKILL, *Circuit Judges.*

MESKILL, *Circuit Judge:*

This case concerns racketeering activity that has plagued waterfront businesses in New York and New Jersey. Judgments of conviction were entered in the United States District Court for th Southern District of New York after a twelve-week jury trial before Judge Sand. The indictment contained 213 counts, charging the defendants with engaging in extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976); receiving bribes in violation of the Taft-Hartley Act, 29 U.S.C. § 186(b) (1976); conducting and conspiring to conduct an enterprise's affairs through a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. §§ 1962(c) and (d) (1976); evading taxes and filing false tax returns in violation of 26 U.S.C. §§ 7201 and 7206(1) (1976); and making false declarations before a grand jury in violation of 18 U.S.C. § 1623 (1976). A schedule listing the defendants' various convictions and the sentences imposed appears in the appendix.

BACKGROUND

The evidence offered by the government at trial depicted Michael Clemente as the ringleader of a highly organized

enterprise that had infiltrated all aspects of waterfront business, including labor, shipping, and ship-servicing. Clemente's specific area of control was identified as the New York waterfront. The evidence described the other defendants as follows: Fiumara acted as the New Jersey waterfront "boss" but was subordinate to Clemente; Copolla was a personal assistant to Fiumara; Gardner and Colucci were presidents of two New Jersey International Longshoremen's Association (ILA) locals and answered directly to Fiumara in connection with their illicit activities; Buzzanca was president of two New York ILA locals and conducted his activities under the supervision of Fiumara; and Swanton, a vice-president of a shipping company in New York, worked closely with Clemente.

The linchpin of the enterprise was its control of the ILA in New York and New Jersey; with this power it was able to extort monies from shipping companies and influence their decisions regarding the allocation of ship-servicing contracts. The latter influence empowered the enterprise to extort monies from the companies that provided services such as the lashing and carpentry work required in connection with loading and unloading cargo. Only those shipping companies and ship-servicing companies that paid the amounts demanded by the enterprise, or "did the right thing" in the argot of the waterfront, had their ships' cargo loaded and unloaded without interruption or obtained and retained contracts to provide their services. The evidence adduced at trial largely concerned dealings between each of the defendants and the government's principal witness, William Montella, who was employed by several ship-servicing companies during the indictment years.

The Court-Authorized Surveillance

Between August 1977 and March 1978 the government monitored oral conversations through listening devices in-

stalled in Montella's offices, which had been authorized by court order pursuant to 18 U.S.C. §§ 2510-2520 (1976).[1] The intercepted conversations combined with physical surveillance of Montella provided the government with substantial proof of Montella's pattern of monthly deliveries of cash to the defendants Clemente and Buzzanca.[2] Montella was approached by the government in May 1978 and agreed to cooperate in June of that year.[3] From June through December 1978 Montella met with several of the defendants and successfully recorded sixteen of their meetings.[4]

Additionally, several consensual recordings made in the course of an independent New Jersey state investigation were admitted into evidence. In one conversation Fiumara promised a New Jersey undercover officer certain waterfront business and, in another, Copolla described Fiumara's waterfront control and Copolla's own role as Fiumara's assistant.

The Netumar Account

From 1970 to 1972 New Jersey Export Co. (N.J. Export) served as the carpentry contractor for Netumar Steamship Line (Netumar), which operated from Pier 36 in Manhat-

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[1] Six extension orders were issued to continue the surveillance. *See* 18 U.S.C. § 2518(5) (1976).

[2] Court-authorized listening devices were also planted in Buzzanca's offices between March 1978 and June 1979. Conversations concerning arrangements of meetings between the various defendants and discussions about the extortion of waterfront companies were intercepted.

[3] Montella agreed to plead guilty to two five-year felonies of conspiracy and one five-year felony for tax evasion.

[4] During these meetings Montella used government funds to pay Clemente $7,000, Fiumara $4,000, Buzzanca $13,000, and Gardner $1,000.

tan. At that time, Montella was the general foreman for N.J. Export. Montella testified that beginning in 1970 or 1971 defendant Swanton, then a vice-president of Netumar, threatened that unless Montella agreed to "do the right thing" Swanton would "throw them out" and find another company that would make the payoffs demanded. Swanton informed Montella that he was associated with Clemente, who was the behind-the-scenes boss who ran the East River Piers in Manhattan, and that some of the kickback money wold be given to Clemente. When Montella asked Swanton how he was expected to raise the cash to make the payoffs, Swanton instructed him to inflate his materials bills. Montella agreed to make the payoffs and admitted that he later kept some of the money generated in this manner for himself.

When Montella left N.J. Export to join a Brooklyn-based company, C.C. Lumber Co., he asked Swanton whether his new employer could obtain the Netumar account. Swanton denied the request, asserting as his reason Clemente's dislike for Anthony Scotto, the Brooklyn ILA local president.

In June 1973 Montella left C.C. Lumber and joined Quin Lumber, another Brooklyn-based carpentry and lashing company. Quin Lumber's employees, like those of C.C. Lumber Co., belonged to the ILA Brooklyn local run by Anthony Scotto. In early 1974 Swanton called Montella and advised him that Clemente had resolved his differences with Scotto and that, therefore, Montella's Brooklyn employer could now obtain the Netumar account. Thereafter, they arranged a meeting where Swanton told him: "Listen . . . go to the Shelton Health Club. Ask for Mike C. Give him 500 . Give him 500 a month. . . . Give him 500 and make him happy." Montella testified that shortly thereafter he met Clemente at the Shelton Health Club, where the following exchange took place:

MONTELLA: Mike, I'm Sonny [Montella]. Gerry [Swanton] told me to come down. I'm with Quin Lumber and I'm going to be doing the carpentry work down there.

CLEMENTE: I hope you do the right thing. I hope you are not cheap.

MONTELLA: I'm going to give you 500 a month.

CLEMENTE: Okay. If you have any problems down there . . . let me know. Go out and make money.

Montella testified that some time in April or May 1974 he returned to the Shelton Health Club and handed Clemente $500 in cash in a white envelope. Thereafter, Montella delivered $500 in the same manner once a month through December 1976. Montella testified that he continued to make the payments because he feared that if he stopped he would lose the Netumar account.

In 1976 Montella placed a bid with Netumar for the contract to perform the lashing work in addition to the carpentry services his company already was providing. When Montella's bid was rejected, he approached Clemente for assistance. Clemente gave Montella instructions; Montella followed them and was subsequently awarded the lashing contract with Netumar. Later, Clemente asked for another $500 per month and Montella acquiesced. Thereafter, from January 1977 through December 1978 Montella paid Clemente $1,000 in cash at their monthly meetings at the Shelton Health Club.

During the same period in which Clemente was receiving payoffs from Montella, he had also arranged to receive $200,000 per year from Netumar itself. When Netumar began its operations at Pier 36 in Manhattan, it believed that it was being grossly overcharged by its stevedore, United Terminals, Inc. (United). Charles Mattmann, Netumar's president, approached officials of United and at-

tempted to negotiate a reduction of the $800,000 annual equipment rental fee it was paying or to buy the equipment outright. United offered to sell the equipment for $1 million, a price considered excessive by Mattmann. Mattmann then approached Clemente for assistance. Clemente offered to intervene provided that Mattmann agreed to pay him 25 cents for each dollar Clemente saved Netumar. Following Clemente's intervention United sold the equipment for $300,000. Thereafter Netumar paid Clemente $200,000 in quarterly cash installments each year. Netumar made these payments from 1973 through 1978 in restaurants in Brooklyn and Manhattan.

The Concordia Line Account

In June 1975 another shipping company, the Concordia Line, decided to move its operation from Hoboken, New Jersey, to Newark. Castelo and Sons Ship Servicing Co., which had been providing the lashing work for Concordia in Hoboken about this time, was approached by defendant Carol Gardner, the president of the black ILA local in Newark. Gardner advised Manuel Castelo and Joseph Castelo, Jr. that they would have to pay him certain amounts of money to retain the Concordia account once it moved to Newark. The Castelos, who were friends of Montella, informed him about Gardner's demands.

Montella subsequently contacted Gardner and inquired about the Concordia Line account. Gardner told Montella to meet him and his "partner," defendant Vincent Colucci, in Miami to discuss the matter. Colucci was then president of the white ILA local in Newark. Montella met with Gardner in Miami but did not reach a final agreement. They continued their discussions in New York, where Montella ultimately agreed to pay Gardner and Colucci $10,000 cash up front and $2,000 cash each month for the Concordia

Line account. Montella also agreed to pay secretly to Gardner an additional $10,000 cash and promised not to disclose this clandestine payment to anyone, including Colucci. In August 1975 Montella met with Gardner and handed him $20,000 in cash. In September 1975 Montella was advised by a Concordia Line official what rates to bid and shortly thereafter was awarded the contract.

Although it had been agreed thta Gardner and Colucci would share Montella's $2,000 monthly payoffs, Montella soon began to receive separate demands for the money from each of them. Each month Montella paid Gardner but, nevertheless, received an additional demand from Colucci. Montella arranged a meeting among the three of them to attempt to straighten out the problem, but the meeting achieved less than satisfactory results.

Afraid that he would continue to be "double-banged," as he later termed it, by Gardner and Colucci, Montella arranged a meeting with Clemente to seek his assistance. Montella met with Clemente at the Shelton Health Club in December 1975 and explained the situation to him. Clemente informed Montella that had he approached him initially he could have avoided paying any money to Colucci and Gardner. Clemente admonished Montella, however, that "[n]ow you make a commitment you got to live up to it." Although Clemente insisted that Montella live up to his "commitment," he advised him to see the defendant Buzzanca and "tell him you are with me and tell him the story."

Subsequently, Montella adventitiously met Clemente and Buzzanca at a restaurant in Manhattan. Clemente introduced Montella to Buzzanca and requested that he recount his story to Buzzanca. Buzzanca apologized to Clemente for the trouble that Montella had experienced and promised to clear up the problem. Buzzanca told Montella to make the monthly payments directly to him in the future. When

Gardner and Colucci next called him, Montella informed them that he had been instructed not to make his monthly payoffs to them any longer and that they would be receiving instructions as well. Montella did not again hear from Gardner or Colucci in connection with this matter.

Montella complied with Buzzanca's directions and paid him $2,000 cash at Buzzanca's office. The first payment was made in the presence of defendant Fiumara, whom Buzzanca had asked to listen to another rendition of Montella's Concordia story. Montella continued to deliver the $2,000 cash payment to Buzzanca at his office or in the men's room of a New York restaurant.[5] Montella testified that the payments he made to Buzzanca were handed over to Buzzanca's boss, defendant Fiumara. The payments continued through December 1978 when Fiumara himself picked up a $2,000 payment.

The Chilean Line Account

In 1975, during the same period in which Gardner and Colucci succeeded in coercing Montella to pay $2,000 per month for the Concordia Line account, they advised Montella that unless he paid them an additional $2,000 per month he would lose his account with the Chilean Line. Montella protested that he had obtained the Chilean account many years before in Brooklyn, and that it would be unfair to demand cash from him to retain it. Gardner replied, "Wrong, that's my account," and advised Montella that to retain the account he had to pay the amount they were demanding. Montella testified that the following dialogue ensued:

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[5] On several occasions Fiumara's assistant, Copolla, came by Montella's offices and picked up the payoff money. On one occasion Laurence Ricci, another assistant to Fiumara, picked up a payment at Montella's offices.

MONTELLA: I got to get out? Just like that I got to get out?

GARDNER: That's it.

COLUCCI: That's it.

MONTELLA: First I buy the Concordia Line and now all of a sudden I am getting thrown out of the Chilean Line.

GARDNER & COLUCCI: That's what the boss said, the boss wants you out.

MONTELLA: The boss, who is the boss? I thought you were the boss.

Gardner: You don't know who the boss is?

MONTELLA: No.

GARDNER: T is the boss.

Montella testified that "T" was the defendant, Tino Fiumara. Montella subsequently advised the vice-president of the Chilean Line that he would no longer "do his vessels in the Port of New Jersey . . . because it was just a little too expensive . . . to do his business."

Clemente and Fiumara—The Bosses of the Enterprise

The government introduced tape recordings of conversations in which several of the defendants professed their loyalty to defendant Fiumara and recognized his authority over them. Buzzanca, for example, stated on one occasion:

> Tino's good point is that everybody fears and respects him. That's a good thing. . . .
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> • • •
>
> I love Tino and I would do anything in the world. . . .
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> • • •
>
> I love him. I love him. And I got to. Ya know like, and I live with him every day. I absolutely think, if this guy tempers himself, he'll be, ten years from now,

> he'll be awesome.... He'll have the best of two worlds. Good sense, good judgment. Plus, which we all live under fear. Ya need to have that balance.... [W]e'll make money. We'll steal it, if we have to.
>
> • • •
>
> Somehow I get in fact, I notice in Tino and more than Mike. I come from the greatest guy in the world.

On another occasion, the following statement was made by defendant Gardner concerning defendant Fiumara:

> I don't make no move until I, you know, check with, I do the right .... I don't have the last decision. I say I'm very loyal to this guy.

Additionally, the government offered evidence of numerous instances in which Fiumara coordinated activities and meetings among Copolla, Buzzanca, Colucci, and Gardner.

Fiumara's authority on the waterfront, however, was not supreme. The government introduced a great deal of evidence demonstrating that Fiumara was subordinate to Clemente. For example, Clemente's handling of Montella's problems with Gardner and Colucci, who answered directly to Fiumara, demonstrated Clement's power to control Fiumara's subordinates, and thus Fiumara. Additionally, in 1978 Clemente was able to arrange increased business for Montella on the New Jersey waterfront, Fiumara's territory, illustrating Clemente's commanding position in the enterprise. After Fiumara acceded to Clemente's request that Montella be given more business, Clemente boasted that "Tino give me some satisfaction." Finally, Clemente took steps to protect the enterprise from investigations, evincing his patriarchal role. For example, the government introduced evidence that Clemente obtained a secret New York Waterfront Commission document containing

information about federal electronic surveillance of Montella, Buzzanca, Gardner, Colucci, and others.

The Defendants' Case

Of the defendants, only Gardner and Swanton testified. Gardner denied all of the allegations that had been asserted against him and stated that he was the victim of a racially motivated conspiracy by the government against blacks. Swanton also contested the charges brought against him and testified that, contrary to his own previous grand jury testimony, he had not possessed the power to choose the carpentry and lashing contractors for Netumar. He testified that he did not believe that Clemente had any influence on Pier 36 in Manhattan.

I

The Hobbs Act Counts

Defendant Clemente asserts that his convictions for extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976), require reversal because the district court's charge was incorrect and because, in any event, insufficient evidence was introduced to sustain them. We conclude that both of these arguments are meritless.

Section 1951 provides in pertinent part:

> Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires to do so . . . shall be fined not more than $10,000, or imprisoned not more than twenty years, or both.
>
> "Extortion" is defined in the Hobbs Act as the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951(b)(2). Clemente's principal contention with respect to the court's charge on the extortion counts is that the trial court improperly charged the jury on the element of wrongfulness.

Extortion, as defined in the Hobbs Act, consists of the use of wrongful means to achieve a wrongful objective. *United States* v. *Enmons*, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973). The Supreme Court's decision in *Enmons* teaches that the applicability of the Hobbs Act to cases such as the one before us depends on whether the statutorily identified means ("actual or threatened force, violence, or fear") have been put to "wrongful use", *i.e.*, have been employed to obtain property to which "the alleged extortionist has no lawful claim." *United States* v. *Enmons, supra*, 410 U.S. at 400, 93 S.Ct. at 1010.[4]

The trial court charged the jury on the elements of extortion as follows:

> First, what is an "extortion"?
>
> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force or fear.
>
> • • • • •
>
> Now, we have said that the word "extortion" means the obtaining of property from another, with his con-

[4] In *Enmons*, the Court held that the Hobbs Act has no application to cases involving "the use of violence to achieve legitimate union objectives." 410 U.S. at 400, 93 S.Ct. at 1010. Specifically, the Court declared that where the objective is higher wages in return for "genuine" services, the Hobbs Act is inapplicable, notwithstanding that violence has been used to exact such higher wages. The Court emphasized, however, that cases involving the use of the statutorily proscribed means to obtain "imposed, unwanted, superfluous and fictitious services" do come within the purview of the Hobbs Act.

sent induced by the wrongful use of actual or threatened force or fear. In this case, the government contends that property was obtained through threats and fear of economic loss.

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In the context of the statute with which we are concerned, . . . fear means that the alleged victim of the charged extortion feared possible financial injury caused by interference with the right to solicit and obtain business or with the right to retain work.

• • • • •

Let me explain to you how the word "wrongful" applies to your consideration of these counts.

"Wrongful" means that in order for you to find that any of the acts of extortion alleged in these counts were, in fact, committed, you must find beyond a reasonable doubt that the defendant or defendants you are considering had no lawful right to the property obtained, and that the property was obtained because of the victim's fear of economic loss.

• • • • •

If you find that threats were made or that fear was reasonably aroused, and if you find that the purpose of the defendant you are considering was to obtain money for himself or others to which they were not entitled, then I instruct you that the element of wrongfulness has been established.

Clemente insists that, in view of the court's charge, the jury could have convicted him solely upon finding that he used fear of economic loss to obtain money from Montella. He contends that the use of fear of economic loss is not inherently wrongful, but rather represents a device rou-

tinely used in legitimate business transactions, and claims that merely using fear of economic loss to obtain money does not render the receipt of such money wrongful. Thus, he asserts that the requirement set forth by the Supreme Court in *Enmons*, that both the "means" and the "objective" be wrongful to constitute extortion within the meaning of the Hobbs Act, *see* 410 U.S. at 400, 93 S.Ct. at 1010, was not adequately conveyed to the jury by the district court's charge.

We are satisfied that the charge correctly instructed the jury on the wrongfulness element of the crime of extortion. The thrust of the district court's charge when read as a whole, see *Cupp* v. *Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400-401, 38 L.Ed.2d 368 (1973), was that the use of fear of economic loss to obtain property to which one is not entitled is wrongful. It is obvious that the use of fear of financial injury is not inherently wrongful. And precisely because of this fact, the "objective" of the party employing fear of economic loss will have a bearing on the lawfulness of its use. In this regard, Judge Sand instructed the jury that the wrongfulness element of the crime would be satisfied upon finding that fear of economic loss was employed by the defendants to obtain money to which they were not lawfully entitled.

Defendant Clemente interprets *Enmons* as limiting the scope of the Hobbs Act to embrace only those cases in which the means and the objective of the alleged extortionist, when viewed *apart* from each other are each wrongful. While this interpretation of the Hobbs Act may be applicable to cases concerning union demands for higher wages, at least one Circuit has questioned whether the Supreme Court's decision in *Enmons* requires that the statute be so strictly construed in other contexts. *See United States* v. *Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979), *cert. de-*

nied, 444 U.S. 1043, 100 S.Ct. 728, 62 L.Ed.2d 1728 (1980). In *Cerilli*, a case involving lessors of road maintenance machinery who were forced to make political contributions to obtain contracts with a municipality, the Third Ciircuit determined that the "manner" in which the property is obtained has a bearing on whether the objective, "obtaining the property from another," is legitimate. In other words, the Third Circuit declined to evaluate the "objective" of the defendants in a vacuum, independent of the conduct involved.

The converse situation exists in this case. Fear of economic loss is not an inherently wrongful means; however, when employed to achieve a wrongful purpose, its "use" is wrongful.

Nor do we agree with Clemente that the court's charge on extortion was improper because it would embrace a broad spectrum of legitimate business transactions. Judge Sand specifically instructed the jury that the Hobbs Act

> does not prohibit any person from using his position of power or influence to obtain legitimate economic ends. The obtaining of money by one who is functioning as a salesman or a broker for the successful solicitation or referral of business, or for use of his influence, good will, or advice, does not in and of itself constitute extortion unless you find that the payment of such monies was induced by wrongful threat or fear of economic loss.

This instruction insured that the jury would distinguish the influence peddler who is lawfully entitled to receive compensation for his legitimate services from persons such as Clemente who exact tribute from their victims in exchange for agreements either to exercise or refrain from exercising the corrupt influence they have acquired.

We conclude, therefore, that the charge was legally sufficient. *See generally United States* v. *Brecht*, 540 F.2d 45, 52 (2d Cir. 1976), *cert. denied*, 429 U.S .1123, 97 S.Ct. 1160, 51 L.Ed.2d 573 (1977); *United States* v. *Tolub*, 309 F.2d 286 (2d Cir. 1962).

Clemente also attacks the sufficiency of the evidence admitted against him in connection with the Hobbs Act violations. The verdict of a jury must be sustained "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *accord, Hamling* v. *United States*, 418 U.S. 87, 124, 94 S.Ct. 2887, 2911, 41 L.Ed.2d 590 (1974). We are satisfied that the government introduced ample proof to demonstrate convincingly that Clemente had no lawful claim to the monies he obtained from Montella. The government established that Clemente's influence with Netumar depended upon his power to call for work stoppages unrelated to any bona fide labor dispute and his willingness to exercise that power for his own personal benefit. Moreover, the circumstances surrounding the actual payoffs, such as the clandestine meetings in secluded areas arranged by Clemente to conduct those transactions, clearly reflect their illicit nature.

Montella testified that Clemente made numerous statements during those meetings concerning his power over the waterfront industry. Clemente explained how the enterprise functioned and told Montella which ILA officials were under his control. Clemente boasted, for example, that he had had great influence in the appointment of Fred Feld as General Organizer of the ILA and that he was grooming Scotto to be Feld's successor. Montella testified that Clemente's statements to him convinced him that Clemente was the power behind the Manhattan piers and that, therefore, he could easily take the Netumar account

away from him if he chose to do so. Moreover, other proof of Clemente's guilty state of mind was introduced at trial. For example, when Clemente learned of a pending waterfront investigation, he admonished Montella never to use his name on the telephone and not to arouse suspicion. On another occasion, Clemente advised Montella that he knew that certain ILA officials would be indicted for extortion and tax evasion; Clemente went so far as to arrange a meeting with Montella and Anthony Scotto to discuss the threat the waterfront investigation was posing to their conspiracy. Finally, in June 1978 Clemente advised Montella that if anyone, including Scotto, betrayed him, "His life won't be worth two cents. In twenty-four hours he'll be gone."

Here, the defendants used fear of economic loss to obtained money to which they had no lawful claim. Notwithstanding defendant Clemente's argument to the contrary, it is clear that a wrongful purpose, obtaining money to which they had no lawful claim, was the aim of the defendants. Thus, the utilization of fear of economic loss to achieve that goal was wrongful. This being the case, the wrongful means and wrongful use elements of the crime of extortion were met.

Swanton's Aiding and Abetting Convictions

Defendant Swanton was convicted on 56 counts of aiding and abetting Clemente's extortion of payoff money from Montella between April 1974 and December 1978. Swanton contends that the district court's charge concerning these counts was improper. Additionally, Swanton attacks the sufficiency of the evidence. We conclude that neither of these challenges has any merit.

To aid and abet the commission of a crime, a defendant must "in some sort associate himself with the venture, . . .

participate in it as something that he wishes to bring about, [and] seek by his action to make it succeed." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938); *see generally Nye & Nissen* v. *United States*, 336 U.S. 613, 619, 69 S.Ct. 766 (1949); *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977); *United States* v. *Mariani*, 539 F.2d 915, 919 (2d Cir. 1976); *United States* v. *Garguilo*, 310 F.2d 249, 252-53 (2d Cir. 1962).

Paraphrasing Judge Learned Hand's language in *Peoni*, the district court charged the jury:

> First, as you no doubt recall from my previous remarks, in order to find that a defendant was an aider and abettor, you must find beyond a reasonable doubt that he had an interest in the crime charged, that is, that he in some way knowingly associated himself with the criminal act alleged, that he participated in it as something he wished to bring about, that he sought by his action to make it succeed.
>
> In your deliberations as to whether Mr. Swanton aided and abetted in these counts, you must consider whether the evidence demonstrates beyond a reasonable doubt that he participated in it as something that he wished to bring about, *that he sought by his action to make it succeed with respect to each payment alleged in each count*—the $500 a month payments from April 1974 through December 1976, and the $1,000 a month payments from January 1977 through December 1978.
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> • • • • •
>
> If you find, however, that the scheme we are discussing in fact existed but that Mr. Swanton at some point affirmatively disassociated himself from it, then you may not consider against him the acts and the

declarations of other participants in the scheme after that date. (Emphasis added).

Swanton claims, citing *United States* v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962), that the district court's charge was too general; he argues that the jury should have been instructed that Swanton's introduction of Montella to Clemente in April 1974 alone could not be the basis of liability under the *Peoni* standard and the facts of the present case. The *Garguilo* case, however, is readily distinguishable from the one at bar. In *Garguilo*, a case involving counterfeiting, the evidence against the defendant Macchia consisted solely of testimony about his "presence" at a few sessions in which the defendant Garguilo practiced his art or attempted to prepare a counterfeit plate. Because the trial court in the course of its charge never told the jurors "in plain words that mere presence and guilty knowledge on the part of Macchia would not suffice unless they were also convinced beyond a reasonable doubt that Macchia was doing something to forward the crime," *United States* v. *Garguilo*, *supra*, 310 F.2d at 254, this Court reversed and remanded the case for a new trial. Here, however, the jury was "plainly" charged that a conviction of Swanton for aiding and abetting Clemente required that they find that Swanton "sought by his action to make [the scheme] succeed with respect to each payment alleged in each count." Plainer language concerning Swanton's purposiveness could hardly have been delivered.

Swanton also argues that insufficient evidence to support his conviction for aiding and abetting Clemente was introduced at trial. He contends that merely introducing Montella to Clemente in April 1974, in connection with the Netumar account, could hardly serve as a sufficient factual predicate for imposing criminal liability for the payoffs

to Clemente during the following four and one-half years. Moreover, Swanton claims that the fact that he did not receive any benefit from the transactions he facilitated between Clemente and Montella illustrates that he had no interest in seeing that the venture succeed. But whether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant for the purpose of determining guilt under that Act. *See United States* v. *Green*, 350 U.S. 415, 420, 76 S.Ct. 522, 100 L.Ed. 494 (1956); *United States* v. *Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 728, 62 L.Ed.2d 728 (1980); *United States* v. *Trotta*, 525 F.2d 1096, 1098 n.2 (2d Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976); *United States* v. *Provenzano*, 334 F.2d 678, 686 (3d Cir.), *cert. denied*, 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed.2d 544 (1964). Rather, the controlling issue here is whether sufficient evidence was introduced at trial for the jury to conclude that Swanton purposively sought to make the kickback scheme succeed. This might have been a close question had the government not introduced evidence of Swanton's history of similar extortionate acts involving the same parties. Around 1970 or 1971, when Montella was employed by N.J. Export and was serving the Netumar Line, Swanton had demanded that Montella kickback monies to him to retain the account. Thus in 1974, when Swanton contacted Montella, who at the time was employed by Quin Lumber, and instructed him to pay Clemente $500 per month to regain the Netumar account, the jury was entitled to infer that Swanton intended to create a scheme similar to the one in which he had actively participated a few years before.

II.

Clemente's Taft-Hartley Convictions

Clemente was convicted on 35 counts of aiding and abetting the receipt of money by Buzzanca, a labor official. Clemente claims that there was a variance between the crimes charged in his indictment and those for which he was convicted. Specifically, Clemente contends that while the indictment charged him with aiding and abetting the *receipt* of illegal labor payments, in violation of 29 U.S.C. § 186(b) (1976), the proof at trial demonstrated, if anything, that he aided and abetted the *making* of those illegal payments, in violation of 29 U.S.C. § 186(a) (1976). We conclude that in light of the great quantity of proof introduced by the government concerning the key role that payoffs to union leaders played in the overall scheme of the criminal enterprise, the limited direct proof of Clement's purposiveness in assisting Buzzanca's illegal receipt of the monies was sufficient to support Clemente's conviction on these counts.

It is clear from the record that Clemente facilitated the arrangement between Montella and Buzzanca. Montella informed Clemente in 1975 about the trouble he was experiencing in connection with his payoffs to Gardner and Colucci concerning the Concordia Line account. Clemente advised Montella that he would have to live up to the commitment he made, but that he should "go see this kid Tommy Buzzanca, tell him you are with me and tell him the story." Shortly thereafter, Clemente introduced Montella to Buzzanca at an unplanned rendezvous in Ponte's restaurant in lower Manhattan. At Ponte's, Buzzanca assured Clemente that "I'll take care of it from here," and told Montella in Clemente's presence to "see me in my office every month. Don't see them [Gardner and Colucci] any-

more." Thus, the record shows that Clemente assisted both parties to the transaction.

At trial Judge Sand charged the jury that "the government contends that the defendants Clemente, Fiumara and Copolla aided and abetted the defendant Buzzanca, a labor official, to request, demand or receive payments from Mr. Montella." While the proof adduced at trial might have made a stronger case against Clemente for aiding and abetting Montella's making the payoffs as opposed to Buzzanca's receiving them, we are satisfied that the evidence is insufficient to sustain Clemente's conviction for the latter. The government correctly observes that there is no authority for the "proposition that a defendant who aids and abets both parties to an illegal transactioin cannot be convicted for aiding and abetting both." All of the authorities cited by Clemente are simply inapposite.

III.

The RICO Counts

Defendants Clemente, Fiumara, Buzzanca, Colucci, and Gardner, were convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1976), and conspiring to violate that statute, 18 U.S.C. § 1962(d) (1976). Defendant Copolla was convicted of conspiring to violate RICO. All of the defendants claim that the enterprise charged in the indictment, a "group of individuals associated in fact" having no legitimate purpose, is outside the scope of the term "enterprise" as it is employed in RICO. See 18 U.S.C. § 1961(4) (1976). Additionally, the defendants claim that the RICO conspiracy count against each of them is unconstitutionally vague. We reject both of these contentions. In *United States* v. *Altese*, 542 F.2d 104, 106 (2d Ciir. 1976), *cert. denied*, 429 U.S. 1039, 97 S.Ct. 736, 50 L.Ed.2d 750 (1977), we held

that the term "enterprise" embraces both legitimate and illegitimate enterprises. This Court recently adhered to the position taken in *Altese* in *United States* v. *Errico*, 635 F.2d 152, 155 (2d Cir. 1980), and *United States* v. *Mannino*, 635 F.2d 110, 117 (2d Cir. 1980). Since our decisions in *Errico* and *Mannino*, in whch we noted the split of authority on this issue, the Sixth Circuit reached a result in line with *Altese* in an *in banc* decision in *United States* v. *Sutton*, 642 F.2d 1001 (6th Cir. 1980), *rev'g United States* v. *Sutton*, 605 F.2d 260 (6th Cir. 1979). Only the First and Eighth Circuits have adopted a contrary view. *See United States* v. *Turkette*, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, —— U.S. ——, 101 S.Ct. 938, 66 L.Ed.2d —— (1981); *United States* v. *Anderson*, 626 F.2d 1358 (8th Cir. 1980). Although we decline this opportunity to review our position taken in *Altese*, we note in passing that the purpose of the "enterprise" here was the establishment of a pattern of racketeering activity in a legitimate business, the waterfront industry.[7]

Defendants claim that since the enterprise charged in the indictment, an association in fact, was itself a conspiracy, a charge that the defendants conspired to create the enterprise is unintelligible. We agree with the Fifth Circuit which squarely confronted and rejected this con-

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[7] In a case strikingly similar to the one at bar that also involved waterfront corruption, the Third Circuit cogently stated:

> The purpose of RICO—prevention of infiltration of legitimate business by racketeers—would in any event be vindicated by the convictions here, since the wholly illegitimate Provenzano association subverted legitimate unions and businesses . . . . We decline in this case to construe the RICO statute so as to allow the appellants a defense that they made sure *not* to engage in any *legal* activity.

United States v. *Provenzano*, 620 F.2d 985, 993 (3d Cir. 1980) (emphasis in original).

tention in *United States* v. *Diecidue*, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980):

> We conclude that Count One of the indictment properly charged a conspiracy to conduct the affairs of a § 1961(4) enterprise through racketeering activities, the nature of which was precisely stated, and adequately informed defendants that the enterprise whose affairs they conspired to conduct was one which they, by their association, had formed. *See United States* v. *Hawes*, 529 F.2d 472, 479 (5th Cir. 1976). That the formation of the enterprise and the conception of the conspiracy may have occurred simultaneously in no way detracts from the Act's applicability.

603 F.2d at 545-46.

Finally, the defendants claim that the district court's charge to the jury concerning the RICO conspiracy counts was improper. The defendants, however, failed to object to this portion of the court's charge and thus waived any objection they may have had in this regard. Fed.R.Crim. P. 30. *See, e.g., Henderson* v. *Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736 52 L.Ed.2d 203 (1977); *United States* v. *Vila*, 599 F.2d 21, 25 (2d Cir.), *cert. denied*, 444 U.S. 837, 100 S.Ct. 73, 62 L.Ed.2d 48 (1979) (alternate holding); 8A J. Moore Federal Practice ¶ 30.04 (2d ed. 1980).

IV.

Defendant Gardner's Cross-Examination

Defendant Gardner claims that he was unfairly cross-examined and that his previous Taft-Hartley conviction was improperly admitted at trial.

Gardner testified on direct examination that he had never received any payoff money from Montella; that hundreds of thousands of dollars of loans accounted for his possession of large sums of money in the indictment years; that he received no loans as a result of his ILA position; and that his prosecution was racially motivated. On cross-examination the government sought to establish that Gardner deliberately burned his personal and business financial records shortly after receiving a subpoena for their production, and that some of his loans were received as a result of his ILA position. Gardner was questioned about having filed false loan applications, and three of these applications were admitted into evidence. Additionally, after questioning Gardner about checks he had purportedly received from waterfront employers for charitable affairs, the government established that the "charities" were frauds and that Gardner had kept the monies for himself. Finally, after Gardner denied that he had received any loans by reason of his union position, the government was permitted to prove that Gardner was convicted for receiving such a loan from a waterfront businessman in 1979.

The defendant contends that Judge Sand failed to consider the prejudicial effect of the impeachment evidence used against him pursuant to Rule 403 of the Federal Rules of evidence.[1] We are satisfied, however, that Judge Sand did not abuse the broad discretion afforded to him under Rule 403. *See generally United States* v. *Benedetto*, 571 F.2d 1246, 1251 (2d Cir. 1978); *United States* v. *King*,

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[1] Fed.R.Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

560 F.2d 122, 128 (2d Cir.), *cert. denied*, 434 U.S. 925, 98 S.Ct. 404, 54 L.Ed.2d 283 (1977). The government's impeachment of Gardner fell into three general categories: (1) inquiries into conduct of the defendant that bore on his character for truthfulness, (2) extrinsic evidence of specific acts, and (3) evidence of a prior conviction. The first two categories fall within Rule 608(b)[9] of the Federal Rules of Evidence, the third within Rule 609(a).[10]

We conclude that the court did not abuse its discretion in allowing the government to inquire into the destruction of Gardner's personal and business records. *See United States* v. *Graham*, 102 F.2d 436, 442 (2d Cir.), *cert. denied*,

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[9] Fed.R.Evid. 608(b) provides:

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

[10] Fed.R.Evid. 609(a) provides:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

307 U.S. 643, 59 S.Ct. 1041, 83 L.Ed. 1524 (1939). The evidence was indisputably relevant to and probative of Gardner's untruthfulness. Likewise, the government's inquiry into Gardner's loan transactions was entirely proper. Gardner had injected the subject into the case in his direct testimony, and the government was entitled to pursue the subject on cross-examination. *United States* v. *Hockridge*, 573 F.2d 752, 761 (2d Cir.), *cert. denied*, 439 U.S. 821, 99 S.Ct. 85, 58 L.Ed.2d 112 (1978); *United States* v. *Benedetto*, *supra*, 571 F.2d at 1250-51. Similarly, the government's inquiries on cross-examination into Gardner's acceptance of checks from Montella and others for the purported charitable affairs were permissible to refute Gardner's direct testimony that he had never taken money for illicit reasons from Montella. We are thus satisfied that the government's inquiries on cross-examination were permissible under Rule 608(b).

The admission of the fraudulent loan applications, however, is another matter. Rule 608(b) explicitly provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking his credibility . . . may not be proved by extrinsic evidence." Even assuming, however, that the loan applications were improperly admitted to prove facts collateral to the charges in the indictment, in view of the substantial evidence introduced against Gardner,[11] we are convinced that any error in their admission was harmless.

Gardner's complaint that his prior conviction should not have been admitted under Rule 609(a) simply does not withstand analysis. The evidence of his conviction was

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[11] Three different employees testified that they personally paid Gardner $200,000 in illegal cash payoffs, and the testimony of three other eyewitnesses corroborated these payoffs. And finally, a tape recording in which Gardner admitted receiving the illegal cash payments was introduced.

not admitted until Gardner denied the facts underlying the conviction. Moreover, Gardner actually requested that it be admitted. The record reveals that Judge Sand bent over backwards to guard defendant Gardner from being unduly prejudiced. Following Gardner's first denial of the facts underlying his pervious conviction, Judge Sand gave him another "chance" to testify truthfully before permitting the government to impeach him with evidence of the conviction.

We have carefully considered all of the defendants' other contentions and find them to be without merit. Accordingly, the judgments of convictions are affirmed.

APPENDIX

Defendant (Total Prison Term; Total Fine; Total Counts)	Counts	Charge	Term of Imprisonment	Fine
MICHAEL CLEMENTE (20 years; $50,000; 103 cts.)	1	RICO	20 years	$25,000
	2	RICO Comp.	20 years	
	49-83	Labor payments	6 mo. each other; conc. to Cts. 1 & 2)	
	87-142	Extortion	20 years each	
	200, 202, 204, 206 208	Tax Evasion	4 years each (consec. to each other; conc. to all others)	$ 5,000 each
	201, 203, 205, 207, 209	Filing False Tax Returns	3 years each (consec. to each other; conc. to all others)	
TINO FIUMARA (25 years; $10,000; 74 cts.)	1	RICO	20 years	
	2	RICO Comp.	5 years	$10,000
	14-48	Extortion	20 years each	
	49-83	Labor payments	6 mo. each (consec. to each other; conc. to Ct. 1)	
	210, 211	Filing False Tax Returns	3½ years each (consec. to each other; conc. with Ct. 2)	$ 5,000

APPENDIX—Continued

Defendant (Total Prison Term; Total Fine; Total Counts)	Counts	Charge	Term of Imprisonment	Fine
THOMAS BUZZANCA (10 years; $5,000; 73 cts.)	1	RICO	10 years	$ 5,000
	2	RICO Consp.	10 years	
	14-48	Extortion	10 years each	
	49-83, 84	Labor payments	3 mo. each (consec. to each other; conc. to others)	
VINCENT COLUCCI (5½ years; $5,000; 12 cts.)	1	RICO	5½ years	$ 5,000
	2	RICO Consp.	5½ years	
	3-6, 13	Extortion	5½ years each	
	8-11	Labor Payments	1 year each (consec. to each other; conc. to all others)	
	212	Filing False Tax Returns	3 years	
CAROL GARDNER (10 years; $5,000; 13 cts.)	1	RICO	10 years	
	2	RICO Consp.	10 years	
	3-6, 13	Extortion	10 years each	
	8-11, 85	Labor payments	1 year (consec. to each other; conc. to all others)	
	213	Filing False Tax Returns	3 years	
MICHAEL COPOLLA (13 years; 1 ct.)	2	RICO Consp.	13 years	
GERALD SWANTON (5 years; $5,000; 60 cts.)	87	Extortion	5 years	$ 5,000
	88-142	Extortion	5 years each	
	196-199	False Statements	5 years each (conc. to each other)	

APPENDIX D

Constitutional Provisions Involved

United States Constitution, Amendment VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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APPENDIX E

Statutes Involved

18 U.S.C., § 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

* * * * *

18 U.S.C. § 2517(5)

* * * * *

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

* * * * *

Statutes Involved

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

Statutes Involved

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

* * * * *

Fed. R. Crim. P. 12(b)(3)

(b) PRETRIAL MOTIONS. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(3) Motions to suppress evidence.

Fed. R. Crim. P. 12(f)

(f) EFFECT OF FAILURE TO RAISE DEFENSES OR OBJECTIONS. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

END OF DOCKET